BOARD OF PROFESSIONAL ENGINEERS, ARCHITECTS, SURVEYORS, AND LANDSCAPE ARCHITECTS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of the Application for an Architects' License of TERENCE MCNULTY, Petitioner.	)	ENG-LIC-2003-2 BOARD'S FINAL ORDER

BOARD'S FINAL ORDER

I. INTRODUCTION

On August 6, 2004, the duly appointed Hearings Officer issued his Findings of Fact, Conclusions of Law, and Recommended Order in the above-captioned matter. See, attached. Copies of the recommended decision were transmitted to the Board of Professional Engineers, Architects, Surveyors, and Landscape Architects ("**Board**") and the parties involved. Respondent Department of Commerce and Consumer Affairs ("**Respondent**" or "**DCCA**") filed written exceptions to the Hearings Officer's recommended decision. No response was received from Petitioner Terence McNulty ("**Petitioner**"). Neither Petitioner nor Respondent requested oral argument.

II. PROPOSED FINAL ORDER

At its October 7, 2004 meeting, the Board reviewed the Hearings Officer's recommended decision and exceptions, and voted to accept and adopt all of the Hearings Officer's Findings of Fact. However, the Board voted to reject the Hearings Officer's Conclusions of Law and to adopt its own Conclusions of Law that (among other things): (1) once approval to take the licensing examination is granted, an applicant must take some

affirmative action (i.e., demonstrate continued efforts) within a two-year period to complete the licensing process; (2) the two-year abandonment period in Hawaii Revised Statutes ("**HRS**") § 436B-9(b) began to run once the Board approved Petitioner to take the examination; (3) because Petitioner did not make any attempt to take the examination for approximately three years after receiving the Board's approval to take the examination and failed to provide the Board with the "requested documents and other information" (i.e., continued efforts to take and pass the examination) for three years after the Board's approval, Petitioner's application was not "complete"; (4) Petitioner's application was therefore abandoned pursuant to HRS § 436B-9(b); and (5) the Board does not retain the discretion to consider an application even after the two-year abandonment period has lapsed unless the two-year period has been extended by rule.

The Board issued its Proposed Final Order ("**PFO**") on or about December 23, 2004, and Petitioner filed exceptions to the Board's PFO on or about January 5, 2005.

At its February 17, 2005 meeting, the Board reviewed the Hearings Officer's recommended decision, its PFO, Petitioner's exceptions, and HRS § 436B-9(b). The Board and Hearings Officer evaluated Petitioner's application under the following version of HRS § 436B-9(b):

> "(b) An application shall be considered to be abandoned if it is not completed and the required documents and other information are not submitted to the department within two years from the last date documents or information were requested; provided that the licensing authority may extend this time period by rule. The licensing authority shall not be required to act on any abandoned application, and the application may be destroyed by the licensing authority or its delegate."

The Board has consistently interpreted this abandonment provision to require an applicant to demonstrate continued efforts to obtain licensure. The Board notes that HRS § 436B-9(b) was recently amended in 2004 by Act 11, and currently states that:

"(b) An application shall be considered to be abandoned if an applicant fails to provide evidence of continued efforts to complete the licensing process for two consecutive years; provided that the failure to provide evidence of continued efforts includes but is not limited to:

(1) Failure to submit the required documents and other information requested by the licensing authority within two consecutive years from the last date the documents or other information were requested; or

(2) Failure to provide the licensing authority with any written communication during two consecutive years indicating that the applicant is attempting to complete the licensing process, including but not limited to attempting to complete the examination requirement; and

provided further that the licensing authority may extend the above time periods by rule. The licensing authority shall not be required to act on any abandoned application, and the application may be destroyed by the licensing authority or its delegate. If the application is deemed abandoned by the licensing authority, the applicant shall be required to reapply for licensure and comply with the licensing requirements in effect at the time of reapplication." (Emphases added).

The Board's prior interpretation and application of the abandonment provision is consistent with the purpose of both versions of the statute (i.e., there is an expectation of progress towards licensure). Whether that included attempts to pass the examination has been subject to different interpretations, as demonstrated by the records in this case. However, the new language, effective on April 22, 2004, clearly imposes affirmative obligations on applicants to attempt to complete the examination requirement and to provide evidence of progress towards licensure.

III. FINAL ORDER

Because the prior version of the statute may have been subject to different interpretations and the 2004 amendments to HRS § 436B-9(b) now clearly require ongoing efforts to take and pass the licensing examination, the Board voted to allow architect applicants who have been approved to take the examination but have not yet passed the examination, two years from April 22, 2004 to demonstrate continued efforts to complete the

licensing process. An applicant shall therefore have until April 22, 2006 to take or continue to take the examination. If the applicant fails to demonstrate efforts to take the examination during the two-year period of April 22, 2004 to April 22, 2006, the application shall be deemed abandoned in accordance with the provisions of HRS § 436B-9(b) and the applicant shall be required to apply as a new applicant and meet the licensing requirements in effect at the time of reapplication.

Accordingly, the Board rejects the Hearings Officer's Conclusions of Law, and orders that Petitioner be allowed to continue to take the examination. The Board further orders that if Petitioner fails to demonstrate efforts to take the examination prior to April 22, 2006, Petitioner's application shall be deemed abandoned in accordance with the provisions of HRS § 436B-9(b).

Dated: Honolulu, Hawaii, February 17, 2005.

Ken Ota
Chairperson

Oscar Portugal
Vice-chairperson

Russell Y.J. Chung
Board member

Peter Dyer
Board member

Alfredo Evangalista
Board member

Randall M. Hashimoto
Board member

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Laurel Mau Nahme
Board member

Wallace Oki
Board member

Richard Suzuki
Board member

Shaun Ushijima
Board member

Marc Ventura
Board member

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February 17, 2005

BOARD OF PROFESSIONAL ENGINEERS,
ARCHITECTS, SURVEYORS, AND LANDSCAPE ARCHITECTS
OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of the Application for an Architect's License of	)	ENG-LIC-2003-2
TERENCE MCNULTY,	)	HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER
Petitioner.	)	

HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND RECOMMENDED ORDER

I. INTRODUCTION

By letter dated October 20, 2003, Terence McNulty ("Petitioner"), filed a request with the Board of Professional Engineers, Architects, Surveyors and Landscape Architects ("Board"), for an administrative hearing to contest the Board's denial of his request for reinstatement of approval to take the architect's licensing examination. Petitioner's request for hearing was received by the Office of Administrative Hearings on October 24, 2003, and the matter was duly set for hearing. At the request of Petitioner, the hearing was subsequently continued and rescheduled to June 22, 2004.

On June 22, 2004, the hearing in the above-captioned matter was convened by the undersigned Hearings Officer pursuant to Hawaii Revised Statutes ("HRS") Chapters 91 and 464. Petitioner was present and appeared *pro se*. The Department of Commerce and Consumer Affairs, State of Hawaii ("DCCA"), was represented by its attorney, Lei S. Fukumura, Esq.

Having reviewed and considered the evidence and argument presented at the hearing, together with the entire record in this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law, and recommended order.

II. FINDINGS OF FACT

1. On May 30, 2000, Petitioner filed an "Application for Licensure - Architect" with the Board.

2. On or about June 23, 2000, the Board transmitted a "Notice of Deficiency" form to Petitioner. The Notice of Deficiency acknowledged receipt of Petitioner's application and informed Petitioner, by a check mark,[1] that consideration of his application was "pending receipt" of a "Verification of Supervision from licensed architect supervisor."

3. On June 8, 2000, the Board received Petitioner's "Verification of Supervision."

4. On July 17, 2000, the Board transmitted a "Notice of Board Action - EASLA" to Petitioner informing him that his "application for exam was APPROVED by the board . . ." The Notice of Board Action - EASLA also stated that:

> ARCHITECT:
>
> Beginning in February 1997, the A.R.E. will be computer-based examination administered by an independent test administrator, the Chauncey Group International. Upon notification from the State board of your approval, the Chauncey Group will mail you an Authorization to Test (ATT) indicating the divisions for which you are eligible. You will also be sent a Bulletin of Information that provides information about how to schedule an appointment to take the examination.

5. Due to personal reasons, Petitioner did not take the Architectural Licensing Examination ("ARE") prior to 2003.

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[1] The Notice of Deficiency consists of a form that lists a number of possible "deficiencies", including one for "Verification of scores/license required from _____." Only the box for "Verification of Supervision" was checked off on the form sent to Petitioner in June 2000.

6. By E-Mail dated July 1, 2003 to the Board's Executive Officer, Petitioner indicated that "I would like to sign up for the test." Petitioner also requested information related to his application.

7. On or about July 3, 2003, the Board's Executive Officer informed Petitioner that he was required to file another application and complete "the intern development program . . . in order to qualify for the ARE exam."

8. By letter dated July 15, 2003 to the Board, Petitioner stated in part:

> If the IDP had been a requirement from the day I started my internship as an Architect I could understand the requirement to fulfill their program but at this point to rebuild all of the records they require is extremely burdensome and even impossible. At least 2 of the firms I spent most of the internship time with are no longer in business, one architect in retirement out of State and another has died. Those records cannot be recovered. This could not even start to establish the amount of information that would have to be recreated for certification with the IDP.
>
> Effectively, by ignoring my records in your possession and my prior acceptance for taking the Architecture Exam you have nullified all my prior Architectural Internship. This means I must repeat 3 years of work experience while maintaining all proper IDP records in order to be allowed to take the exam, not to mention pay the extra moneys required by the IDP including penalties they asses [sic] because I did not join their organization at the time of the completion of my Masters Degree in Architecture. I do not believe this is a just, equitable, or a professional way to treat a valuable member of the Architectural Profession.
>
> Please reinstate my status in regards to taking the Architectural Record Exam and reactivate my file in your possession. I hope to hear from you soon.

9. At its September 11, 2003 meeting, the Board was informed by its Executive Officer that the DCCA had concurred "with the Board's interpretation that if there has been no action taken for more than two (2) years by the applicant, then the application will be considered abandoned." According to the minutes of that meeting, the

Board voted to deny Petitioner's request to restore his application based on "past interpretation and the Department's policy".

10. By letter dated October 3, 2003, the Board notified Petitioner that his request for reinstatement of approval to take the ARE had been denied and that Petitioner would be required to "file a new application and meet the current requirements." The letter also stated:

> Pursuant to section 436B-9(b), Hawaii Revised Statutes ("HRS"), an application shall be considered to be abandoned if it is not completed and the required documents and other information are not submitted to the department within two years from the last date documents and other information were requested. Since you were informed of your approval to take and schedule the A.R.E. in July 2000, and no action has been taken to take the examination for a period of more than two years, your application is considered as abandoned.

11. By letter dated October 20, 2003, Petitioner lodged the instant appeal.

12. By letter dated February 3, 2004, Petitioner wrote to the Board. Among other things, Petitioner indicated that he had received a call from an unidentified individual from the DCCA who assured him that his "eligibility [to take the exam] would remain active."

13. Petitioner's February 3, 2004 letter was addressed by the Board at its February 12, 2004 meeting and subsequently deferred for further investigation.

14. At its March 11, 2004 meeting, the Board determined from its investigation that Petitioner's claim that he had been informed by an employee of the DCCA that his application would remain active could not be verified. As a result, by letter dated April 16, 2004, the Board informed Petitioner that his "request to take the architect registration examination without filing a new application" had been denied.

15. On April 30, 2004, the hearing in this matter was scheduled for June 22, 2004.

III. CONCLUSIONS OF LAW

The salient facts are not in dispute. Petitioner submitted his application for an architect's license by examination on May 30, 2000. On June 23, 2000, the Board

notified Petitioner that his application would be considered upon receipt of a Verification of Supervision from a licensed architect supervisor. The Board received the verification on June 8, 2000 and on July 17, 2000, approved Petitioner's application for exam. For personal reasons, however, Petitioner did not take the exam and did not contact the Board until July 1, 2003 when he informed them of his desire to take the exam. In response, the Board informed Petitioner that because he had failed to take any action on his application for a period of more than two years from the Board's July 2000 approval, the application was considered to be abandoned in accordance with HRS §436B-9(b). As a result, Petitioner was required to submit a new application and complete the Intern Development Program ("IDP") in order to qualify for the ARE.[2]

HRS §436B-9(b) provides as follows:

> **§436B-9 Action on applications.**
>
> * * * *
>
> (b) An application shall be considered to be abandoned if it is not completed and the required documents and other information are not submitted to the department within *two years from the last date documents or information were requested;* provided that the licensing authority may extend this time period by rule. *The licensing authority shall not be required to act on any abandoned application,* and the application may be destroyed by the licensing authority or its delegate.

(Emphasis added).

Based on its interpretation of this provision, the Board concluded that because Petitioner had failed to take any action in furtherance of his application during the two-year period immediately following the approval of his application in July 2000, (1) his application was no longer a valid one, and (2) the Board lacked any discretion in the

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[2] Hawaii Administrative Rules ("HAR) §16-115-59(a) provides:

> Intern development program. (a) Effective June 30, 2000, an applicant shall be required to fulfill the training requirements of the IDP of NCARB as approved by the board, or any similar program satisfactory to the board.

The Board has apparently taken the position that an applicant will not be subject to the requirements of the IDP as set forth in HAR §16-115-59 provided that his or her application for licensure was filed prior to June 30, 2000.

matter. A careful review of HRS §436B-9(b) however, leads the Hearings Officer to contrary conclusions.

At the outset, the Hearings Officer notes that the two-year abandonment period set forth in HRS §436B-9(b) commences on "the last date documents or information were *requested.*" That language clearly provides that an application shall be considered to have been "abandoned" only after (1) a request for documents or information has been made and (2) the applicant does not provide the requested information within the two-year period immediately following the request.[3]

In this case, the Board apparently reasoned that because Petitioner had failed to take any action on his application for a period of more than two years from the Board's July 2000 approval, the application was abandoned under HRS §436B-9(b). However, a review of the record, including the Board's July 2000 Notice of Board Action and approval, fails to disclose any outstanding request for documents or information.[4] Indeed, once the Board received the Verification of Supervision from Petitioner in June 2000, it had all of the information necessary to determine whether Petitioner was eligible to take the ARE, as evidenced by the Board's subsequent approval of that application in July 2000. Nor can the Hearings Officer find any indication in the record that could be construed as either a request or a requirement that Petitioner take the ARE by a date certain and inform the Board of the results.[5] Under these circumstances, the Hearings Officer must conclude that the two-year "abandonment" period was not triggered by the Board's July 17, 2000 approval of Petitioner's application for exam.[6]

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[3] Prior to the 1995 amendments, HRS §436B-9(b) provided that applications could be considered abandoned "if it is not completed and the required documents and other information are not submitted to the department within one *year from the date first filed.*" (emphasis added). The 1995 amendments clearly evidence an intent by the Legislature to commence the abandonment period only after a request for documents or information has been made.

[4] The Board's June 23, 2000 Notice of Deficiency to Petitioner constituted such a request. However, the document requested by the Board to wit, Verification of Supervision, was submitted to the Board by Petitioner in June 2000.

[5] As for example, a Notice of Deficiency requesting that Petitioner submit verification of his test results to the Board.

[6] For these same reasons, an interpretation of HRS §436B-9(b) that *any* 2-year period of inactivity in the application process will result in a determination that an application has been abandoned, regardless of the existence of an outstanding request for documents or information, would be inconsistent with the provision's underlying intent as expressed by the language of the statute. *See Gray v. Administrative Director of Courts, State of Hawaii, 84 Haw. 138 (1977)(When construing a statute, the foremost obligation is to ascertain and give effect to the legislature's intention which is primarily obtained from the language contained in the statute itself).*

Moreover, rather than prohibit the licensing authority *from acting* on abandoned applications, HRS §436B-9(b) instead provides that the "licensing authority *shall not be required to act* on any abandoned application, and the application *may* be destroyed by the licensing authority or its delegate." That distinction leads the Hearings Officer to further conclude that the licensing authority retains the discretion (1) to consider an application even after the 2-year abandonment period has lapsed and (2) to determine whether to destroy such applications.[7] Thus, even assuming that the abandonment period had lapsed pursuant to HRS §436B-9(b), the Board still maintained the discretion to consider Petitioner's application provided, of course, that the records had been retained by the DCCA.[8]

IV. RECOMMENDED ORDER

For the reasons set forth above, the Hearings Officer recommends that the Board find and conclude that Petitioner's application has not been "abandoned" under HRS §436B-9(b) and that Petitioner is entitled to take the ARE. In the alternative, the Hearings Officer recommends that the Board find and conclude that it has the discretion to consider whether to grant Petitioner's request to restore his original application.[9]

DATED at Honolulu, Hawaii: AUG - 6 2004.

CRAIG H. UYEHARA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

[7] If, as a matter of policy, the Legislature desired to eliminate the Board's discretion to consider license applications once the abandonment period had lapsed, it could have so provided in HRS §436B-9(b): "the licensing authority shall *not act* on any abandoned application . . ."

[8] The legislative history underlying HRS §436B-9(b) refers to that section as relating to "the disposing of abandoned applications" and the "handling of abandoned applications." See House Journal, Standing Committee Report No. 787 (1995). Those references, together with the language of HRS §436B-9(b), strongly suggest that the purpose of HRS §436B-9(b) was to provide a basis for the licensing authority/DCCA to formulate a record-retention policy for license applications rather than to place any limitations on the authority's power to consider such applications.

[9] In considering whether to allow Petitioner to take the ARE on the basis of his original application, the Board may properly consider, among other factors, the hardship placed upon Petitioner in requiring him to reconstruct the information and verifications required by the IDP, and the fact that the IDP was not a requirement when Petitioner began his internship.